

June 12, 2024

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Docket No. 3:16-md-2738-FLW-LHG

IN RE:

JOHNSON & JOHNSON TALCUM
POWDER PRODUCTS MARKETING,
SALES PRACTICES AND PRODUCTS
LIABILITY LITIGATION

HESS MOTION AND
INSPECTION MOTION
VIA REMOTE ZOOM
VIDEOCONFERENCE

* * * *

WEDNESDAY, JUNE 12, 2024

* * * *

BEFORE: SPECIAL MASTER JOEL SCHNEIDER, USMJ, RETIRED
jschneider@mmwr.com
856-488-7797

MASTROIANNI & FORMAROLI, INC.

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P.O. BOX 368

Haddon Heights, New Jersey 08035

856-546-1100

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1

A P P E A R A N C E S:

2

3

ASHCRAFT & GEREL, LLP

4

BY: MICHELLE A. PARFITT, ESQUIRE

1825 K STREET, NW

5

WASHINGTON, DC 2006

800-674-9725

6

202-759-7648

mparfitt@ashcraftlaw.com

7

ATTORNEYS FOR THE PLAINTIFFS

8

9

BEASLEY ALLEN LAW FIRM

BY: LEIGH O'DELL, ESQUIRE

10

218 COMMERCE STREET

P.O. BOX 4160

11

MONTGOMERY, ALABAMA 36104

800-898-2034

12

FAX - 334-954-7555

leigh.odell@beasleyallen.com

13

ATTORNEYS FOR THE PLAINTIFFS

14

15

BURNS, CHAREST, LLP

BY: NATALIE EARLES, ESQUIRE

16

365 CANAL STREET

SUITE 1170

17

NEW ORLEANS, LOUISIANA 70130

504-799-2845

18

FAX - 504-881-1765

nearles@burnscharest.com

19

ATTORNEYS FOR THE PLAINTIFFS

20

21

22

23

24

25

1

2

FAEGRE, DRINKER, BIDDLE & REATH, LLP

3

BY: SUSAN M. SHARKO, ESQUIRE

600 CAMPUS

4

FLORHAM PARK, NEW JERSEY 07932

DIRECT - 973-549-7350

FAX - 973-360-9831

5

susan.sharko@faegredrinker.com

6

ATTORNEYS FOR THE DEFENDANT,

JOHNSON & JOHNSON and JOHNSON & JOHNSON

CONSUMER COMPANIES, INC.,

7

now known as JOHNSON & JOHNSON CONSUMER, INC.

8

9

KING & SPALDING, LLP

10

BY: MATTHEW BUSH, ESQUIRE

- and -

11

BY: KRISTEN FOURNIER, ESQUIRE

1185 AVENUE OF THE AMERICAS

34TH FLOOR

12

NEW YORK, NEW YORK 10036

212-790-5356

13

mbush@kslaw.com

ATTORNEYS FOR THE DEFENDANTS

14

15

16

17

A L S O P R E S E N T :

18

19

MONTGOMERY, McCRACKEN, WALKER & RHOADS, LLP

20

BY: CLARISSA LINTNER, ESQUIRE

1735 MARKET STREET

21

21st FLOOR

PHILADELPHIA, PENNSYLVANIA 19103-7505

22

215-772-7411

FAX - 215-772-7620

23

rgoodman@mmwr.com

24

Laura Seggerman

25

1 SPECIAL MASTER SCHNEIDER: Good
2 morning, everybody. This is Judge Schneider, the
3 Special Master in the Talc MDL. We're here for oral
4 argument on two motions. I'll call them the Hess
5 motion and the Inspection Motion.

6 As I noted in my email, we'll hear oral
7 argument on the Hess motion first, and then we'll go
8 to the Inspection Motion.

9 I don't expect to rule today, but you
10 will receive prompt decisions after today's argument.

11 So what we usually do is enter the
12 appearances for the attorneys who are expected to
13 talk. Anyone else who wants to enter their
14 appearance, that's fine. And if someone who doesn't
15 announce their name is going to talk, just please
16 identify yourself for the record.

17 So why don't we start for the
18 Plaintiffs on the Hess motion.

19 MS. O'DELL: Good morning, your Honor.
20 Leigh O'Dell from Beasley Allen on behalf of the
21 Plaintiffs' Steering Committee.

22 MS. PARFITT: Good morning, your Honor.
23 Michelle Parfitt, also on behalf of the Plaintiffs'
24 Steering Committee. I don't anticipate speaking
25 today.

1 MR. BUSH: Good morning, your Honor.

2 Matthew Bush on behalf of the Defendants. And with
3 me is Kristen Fournier, also from King & Spalding.

4 MS. SHARKO: Susan Sharko from Faegre
5 Drinker and I don't anticipate speaking today.

6 SPECIAL MASTER SCHNEIDER: We've been
7 at this a number of times and you know how I like to
8 proceed.

9 I've read all the papers. I think I
10 understand the issues. If you'll indulge me, I have
11 a few questions and then we'll hear any argument
12 counsel wants to make. You won't be cut short by my
13 questions.

14 Let me start by directing this to
15 Mr. Bush.

16 With regard to Mr. Hess, what is it
17 that you expect to hear from Mr. Hess that you don't
18 already know or can or could have gotten from Dr.
19 Longo?

20 MR. BUSH: Yeah, I think the questions,
21 your Honor, are the questions that Dr. Longo is
22 deflecting by saying he needs to be looking down the
23 microscope, which at least in the vast if not the
24 overwhelming majority of times he's not doing. So
25 some of the questions are, you know, how are you

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1 calling this yellow purple? When you're looking down
2 the microscope, are you really seeing purple there?

3 What's the basis for looking only at
4 the particles?

5 Have you ever done that in your 40
6 years of experience doing PLMs?

7 You know, is the coloring around the
8 edges just an artifact of the imaging or is that what
9 you're actually seeing down the microscope? Dr.
10 Longo said he didn't know if it was artifact or not.

11 So there is lots of questions like
12 that. And we had asked -- I want to answer your
13 question, not divert to argument, but we had asked
14 Dr. Longo, you know, is this entire analysis wrong,
15 the way you're doing it? And he said, well, if you
16 look down the microscope, then I stand by my results.
17 And that's not what Dr. Longo is doing. That's Mr.
18 Hess' job to be looking down the microscope.

19 So there are lots and lots of questions
20 that we'd like to ask him that we're at an impasse on
21 in part, and I don't want to get into the Inspection
22 Motion, but in part because Dr. Longo is not the one
23 who is really doing the work.

24 SPECIAL MASTER SCHNEIDER: Mr. Bush,
25 one of the things that the Plaintiffs pointed out,

1 and I read the two-volume transcript of Dr. Longo in
2 this case. Plaintiffs have pointed out that, at
3 least to my recollection and you can correct me if
4 I'm wrong, that there wasn't one question that was
5 asked where Dr. Longo was unable to answer. So why
6 is it that you say that he deflected answers?

7 MR. BUSH: See, I don't think that's
8 right, your Honor. You know, we don't ask him the
9 same questions over and over again once he's already
10 answered them. In fact, I think he says in the
11 beginning of his MDL report, I've been asked about
12 this stuff a whole bunch of times.

13 So Dr. Longo, for example, in the
14 Valadez deposition, and we can talk about why that
15 Valadez testing is very much a part of the MDL, in
16 the hearing in Clark just about ten days ago, which
17 was going to be very similar to the hearing that is
18 going to happen before this Court because it's about
19 the reliability of the opinion, he may not say the
20 words "I don't know," but what he's saying is to
21 answer your question, I would have to be looking down
22 the microscope. But since Dr. Longo is the one who
23 is not looking down the microscope, that's the
24 equivalent of saying I don't know.

25 One of the questions, and I just said

1 it, was: If you're doing it this way, doesn't it
2 make your entire analysis wrong? And Dr. Longo said:
3 I'd have to be looking down the microscope.

4 So that, to me, is the equivalent of
5 saying I don't know because he's not even the one
6 looking down the microscope. So he's not the one
7 doing the work. So it's critical for us to hear it
8 from the horse's mouth, the person who is really
9 looking at these particles and the one who really has
10 the expertise doing the PLM work.

11 SPECIAL MASTER SCHNEIDER: Well, let me
12 follow up a little bit. And, Leigh, we'll certainly
13 hear from you on this issue.

14 While I'm trying to get back my train
15 of thought, Leigh, I know what the Plaintiffs'
16 position is, but one of the things that Defendants
17 pointed out in the supplemental brief was the
18 citations to the Clark hearing. I assume that was a
19 state court hearing akin to a Daubert-type hearing.
20 Doesn't that put the nail in the coffin that Dr.
21 Longo himself is unable to answer relevant questions
22 and that we have to get that information from Mr.
23 Hess?

24 MS. O'DELL: Your Honor, I don't think
25 so. I mean when you look at the whole colloquy of

1 the examination of a particular photomicrograph and
2 let me just set the stage for ten years in this
3 litigation, maybe a little less than that, I may
4 overstate there, but a long time in this litigation
5 and certainly on the PLM work, what has been relied
6 on are the photomicrographs and the specific
7 structures being captured. That's what Dr. Longo is
8 opining on. And he's providing answers to those
9 questions about the photomicrograph, but a great
10 example of where this discussion goes and where Dr.
11 Longo has said, I would need to look at the
12 microscope, often times is not necessarily the actual
13 image that he's opining on, but it could be something
14 that's adjacent. Something that's in the photo, but
15 not necessarily.

16 And I'll give you an example. This was
17 actually from the reply in the Inspection Motion.
18 It's Exhibit L. And there was a long examination
19 where Dr. Longo answered all matter of questions
20 about the photomicrograph and it gets down to one
21 particular portion. And he says, I need to be
22 looking at the microscope, and I'm reading from
23 page -- it's Exhibit L on page 56 of the deposition,
24 lines 11 through 14. And he says this is not
25 something we identified. He says: I mean I have to

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1 be looking in the microscope to tell you what that
2 is. It's not something we identified.

3 So you have all these questions going
4 to specific photomicrographs and Dr. Longo is
5 answering questions. And then it gets out to this
6 sort of extrapolated point and he says at this point
7 I need to look at the microscope.

8 In some instances he's saying this is a
9 PDF and it's been copied several times, I can't see
10 that clearly. Or it's on Zoom and the resolution is
11 not something he feels is sufficient. So what we saw
12 in the MDL deposition is that he answered every
13 question. He is opining on specific
14 photomicrographs. He has laid out his methodology in
15 detail, not only in his MDL or supplemental report,
16 but also each of the underlying reports that he's
17 relying on and that he's been examined on. And so
18 this effort to now go to Paul Hess, Paul Hess is
19 going to be looking at the photomicrographs. He's
20 not going to be at a microscope, and I know we're
21 going to talk about inspection, but for these samples
22 and what he was identifying there, he is not going to
23 be looking at the microscope there. So what they're
24 trying to do is just undermine the opinion that Dr.
25 Longo has given based on the materials.

1 And, Judge, I don't want to go too far,
2 but there are some underlying things I want to get
3 to, but I want to also just answer your question and
4 I realize I probably didn't do that succinctly, but
5 I'm trying to give you the information that would be
6 helpful.

7 SPECIAL MASTER SCHNEIDER: You'll have
8 every opportunity in the world to make every argument
9 you make after we get through these questions.

10 MS. O'DELL: Okay.

11 SPECIAL MASTER SCHNEIDER: Mr. Bush,
12 let me get back to you because I want to be clear
13 that I'm clear on this. What tests are you intending
14 to question Mr. Hess about?

15 MR. BUSH: We would only be asking Mr.
16 Hess about the tests that he ran. So there is a
17 whole set of tests that Dr. Longo has done that were
18 part of the first round of MDL reports using TEM,
19 transmission electron microscopy, that Paul Hess
20 isn't a part of it because he's the PLM person at
21 MAS. And we wouldn't be asking him about this at
22 all. We would be asking him about the PLM tests that
23 he's a part of, and particularly this new chrysotile
24 PLM method. That's really what we're narrowing it
25 down to. It's the questions about the new PLM method

1 that's claiming to find chrysotile in one hundred
2 percent or nearly one hundred percent of samples
3 being tested. And he's the analyst on the worksheet
4 for every single one of those tests that are at
5 issue.

6 SPECIAL MASTER SCHNEIDER: How is that
7 PLM test different than the PLM test that Judge
8 Wolfson addressed in her Daubert decision?

9 MR. BUSH: Yeah, I think it does suffer
10 from a lot of the same flaws as what Judge Wolfson
11 addressed, but it is different for a lot of different
12 reasons.

13 He's using a new methodology that he
14 says is not ready to be peer-reviewed. Part of that
15 methodology is using a different oil, so the oil
16 changes the color. He's using a different kind of
17 light bulb now in his microscope which is affecting
18 the color and color is all that this is about. He's
19 now saying that he's looking at the edges of the
20 particles instead of looking at the color that sort
21 of the entire particle is. And there is a new prep
22 method. So it's very different. And the biggest
23 difference is there is this core dispute about what
24 is the color of these particles and what are you
25 seeing that wasn't a dispute the last time in the

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1 PLM. So I do think it has a lot of the same problems
2 about reproducibility. The ability to get the weight
3 percentages just by eyeballing it. All those things,
4 I think, have problems, but we have a new dispute and
5 it's a totally new method.

6 And just to put a fine point on it, he
7 had never found chrysotile before in all of the PLM
8 tests he did in the first round. And now he's
9 claiming to find chrysotile in a hundred percent of
10 the tests that he's doing. So it's clearly very
11 different because he's getting very different
12 results.

13 SPECIAL MASTER SCHNEIDER: I don't know
14 if you have it in front of you, but what I have in
15 front of me is the appendices in the two expert
16 reports -- appendices and exhibits of the two expert
17 reports of Dr. Wiley and Dr. Su. Dr. Wiley is
18 Appendix 5 and Dr. Su is Exhibit B.

19 Do you happen to have that there Mr.
20 Bush?

21 MR. BUSH: I can get it, your Honor.
22 There is a bunch of exhibits here, but if there is
23 something specific you want to ask me about, I bet I
24 can answer, but I can try to pull it up as you're
25 asking.

1 SPECIAL MASTER SCHNEIDER: Here is my
2 question.

3 My understanding, and I hope I'm
4 correct, is that these are the test results that Dr.
5 Longo is going to rely upon to opine that asbestos
6 was found in Johnson & Johnson's Baby Powder.

7 Am I right about that?

8 MR. BUSH: I'm not sure I know when you
9 say these tests you're referring to the ones that Dr.
10 Wiley and Dr. Su are opining on?

11 SPECIAL MASTER SCHNEIDER: Well, I'm
12 referring to the tests that are listed in Appendix 5
13 of Dr. Wiley's report, which appears to be the same
14 list as Exhibit B in Dr. Su's report.

15 MR. BUSH: Okay. Your Honor, it's just
16 going to take me a minute to pull up those particular
17 appendices. I'm sure I can get you an answer to
18 that.

19 SPECIAL MASTER SCHNEIDER: Let's see if
20 we can pull those up, because I think it's an
21 important issue.

22 MR. BUSH: No, I'm happy to.

23 MS. O'DELL: I'll just say, your Honor,
24 I had them printed out here, it is the same list in
25 each expert's report. I have not reconciled that

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1 list with Dr. Longo's testing that the Plaintiff
2 Steering Committee disclosed, but it is actually the
3 same list of tests for each of those experts.

4 SPECIAL MASTER SCHNEIDER: See one of
5 my questions regarding the lists is which of the test
6 results on these lists are the new PLM methodology
7 that J&J wants to question Hess about?

8 MR. BUSH: So I am looking at -- let me
9 make sure I have it. I have Dr. Wiley's report up.
10 It's just --

11 SPECIAL MASTER SCHNEIDER: Appendix 5.

12 MR. BUSH: Okay. I'm looking at it.

13 So I guess I would say I would agree
14 with Leigh. I haven't gone myself and matched these
15 up to the tables at the end of Dr. Longo's report,
16 which is Exhibit B to the PSC's brief. But I believe
17 all of these -- what these should be -- for Dr.
18 Wiley, Dr. Wiley's report, the report you're looking
19 at, is only about Dr. Longo's new chrysotile testing.
20 That's the entirety of this report.

21 She did have another report that was
22 issued in the first round of briefing about his last
23 testing, I think that's all still in play, but what
24 you have in front of you is a hundred percent about
25 his new chrysotile method. So all of these should be

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1 his new chrysotile testing and all of them should be
2 testing that is part of the MDL and reflected on
3 tables one through seven at the end of Dr. Longo's
4 report.

5 I haven't matched it up myself
6 personally and you know it has -- you got to match up
7 these M numbers, and we can do that for you, your
8 Honor, but all of this should be the same or at
9 minimum there should be a substantial overlap in
10 those.

11 SPECIAL MASTER SCHNEIDER: So the
12 inclusive dates of these test results are February
13 24, 2020 to February 15, 2024, a four-year time
14 period, right?

15 MR. BUSH: I would say yes, your Honor,
16 other than with the friendly amendment, I hope that
17 Dr. Longo at the MDL had said I'll actually have a
18 couple new tests that I'm relying on, so I'm not sure
19 that end date is fixed, but yes, your Honor, it's a
20 roughly four-year period that he's been doing these
21 tests.

22 SPECIAL MASTER SCHNEIDER: Okay. So
23 you want to ask Hess about these tests that were
24 conducted over a four-year time period?

25 MR. BUSH: Yes, your Honor. That's

1 right. I mean the methodology has been a moving
2 target and has been changing over the course of that
3 time frame. So what was happening earlier on and how
4 it's different from what's happening now is very
5 relevant. And I think that we can -- I think we can
6 make it easier, your Honor, and we can narrow it to
7 the tests that are listed in the table of Dr. Longo's
8 report.

9 If you want something, you know, a hard
10 line as to what we're going to test about and not
11 test about, there are tables at the end of Dr.
12 Longo's report in this MDL and it's all the tests
13 that he's relying on. And there are some of them --
14 most of them in those tables that you can see if
15 they're chrysotile tests or not. There is a column
16 for if he found chrysotile or not or if it was N/A
17 for not testing it that way. But we would want to
18 question Mr. Hess about the testing that's reflected
19 in those tables.

20 But I will say, your Honor, I don't
21 think the plan would be to go test by test by test by
22 test for all of these. As you've seen in the
23 examples we've given, we tend to use representative
24 examples of this. So this is what the test was
25 looking like in this time frame when you had this

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1 light bulb on the microscope and it made it look all
2 orange. Okay. Well, now let's jump ahead two years
3 and now you have a new light bulb, right, Mr. Hess
4 and now, you know, let's look at these tests that
5 look a totally different color. So I don't think
6 it's going to be the giant sprawling thing where we
7 have to go through four years worth of testing. The
8 time frame is important and different time periods
9 are important and they may have to go back four
10 years, but it wouldn't be test after test after test
11 after test after test, you know, trying to -- it's
12 not a memory test. It's about the methodology that
13 he's using and how it's evolved and changed over
14 time.

15 SPECIAL MASTER SCHNEIDER: Mr. Bush,
16 the tests in Dr. Longo's expert report is that the
17 fourth report, fourth supplemental report?

18 MR. BUSH: That's correct, your Honor.

19 SPECIAL MASTER SCHNEIDER: Help me, do
20 you happen to have a citation to where in that report
21 I can find the list of test results that he's going
22 to rely upon so we can correspond them to Appendix 5?

23 MR. BUSH: Yes, your Honor.

24 Unfortunately, the tables at the end don't have page
25 numbers, so he has the body of his report and then

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1 the page numbers run out. And so it's tables one
2 through seven. I can also pull that up and show you
3 where exactly it is and what I am referring to.

4 SPECIAL MASTER SCHNEIDER: Yeah, if you
5 can do that, I think that would be --

6 MR. BUSH: If I may share my screen,
7 your Honor.

8 MS. O'DELL: Your Honor, may I just
9 clarify what you're asking just to make sure I might
10 be a little bit more informed to talk about what Dr.
11 Longo's is relying on with Mr. Bush?

12 SPECIAL MASTER SCHNEIDER: Okay. I
13 mean that's a fair question or clarification.

14 The doctor had listed the J&J test
15 results that identified asbestos. I think based upon
16 what I've heard so far, a fair assumption is that
17 these are the test results under the new PLM
18 methodology. The question I had is Mr. Bush had said
19 they want to question Dr. Longo about the tests he's
20 going to rely upon if he gets to testify at trial. I
21 don't know if it's the same list that's in Appendix 5
22 or there is a different list. And that's what I'm
23 trying to get clarification of.

24 MS. O'DELL: Understood.

25 Let me start with what Dr. Longo is

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1 going to rely on. If Matt is correct, starting at
2 Table One at the end of Dr. Longo's fourth
3 supplemental report, he has seven tables and he lists
4 the tests that he's going to rely on for this portion
5 of his opinion.

6 For example, and thanks for putting
7 that up, Matt. If you can make it maybe a bit
8 bigger.

9 Thank you.

10 So if you'll go back to the left, Matt,
11 where it has the sample number. This is the sample
12 number and it corresponds with samples that are in
13 the reports that the Plaintiff Steering Committee
14 disclosed.

15 Matt, if you can just isolate so if you
16 look at number one, it says M66514-001. That's the
17 top one. There.

18 That doesn't appear to be on this
19 appendices with Dr. Wiley and Dr. Su. We haven't
20 deposed them. We don't know why that's the case, but
21 that is a sample that's not on there.

22 If you look down further --

23 MR. BUSH: If I can just answer that.
24 I'm sorry to interrupt.

25 This column on the very right which

1 says chrysotile percentage is the percentage of
2 chrysotile that Dr. Longo is finding.

3 Their sample, I actually know this case
4 from before he started doing this methodology, this
5 is an N/A because he never tested that sample for
6 chrysotile.

7 And so on this column when you see a
8 percentage of chrysotile found, that means he's done
9 the test for that corresponding sample. So that's
10 the reason why the first one is not on Dr. Wiley's
11 report, but these other ones likely should be.

12 MS. O'DELL: And so Dr. Longo's list,
13 the explanation, I don't disagree with the
14 explanation that Matt's given, doesn't line up
15 perfectly with Dr. Wiley and Dr. Su's appendices
16 because ostensibly they're only commenting on
17 certain samples.

18 And so, you know, if you want us to
19 reconcile, I'm happy to work with Matt to do that so
20 you can have -- I think it would be helpful to take
21 Dr. Longo's listing and isolate the particular tests,
22 but there are some underlying things, your Honor,
23 that I need to speak to, but I don't want to get
24 ahead of your questions.

25 SPECIAL MASTER SCHNEIDER: Let's finish

1 this train of thought because I think it's important.

2 So on this table two, the first sample
3 is 66507. And let me just see -- yeah. So --

4 MS. O'DELL: That sample, your Honor,
5 just to anticipate your question.

6 SPECIAL MASTER SCHNEIDER: 66509 is --
7 see, I don't see that on the list --

8 MS. O'DELL: Correct.

9 SPECIAL MASTER SCHNEIDER: -- but
10 yet --

11 MR. BUSH: So, your Honor, 66507 is
12 part of the 3-23-2021 on Dr. Wiley's list. It's the
13 one with all of them combined, the second one is
14 66507-001.

15 SPECIAL MASTER SCHNEIDER: But how
16 about 66509?

17 MR. BUSH: Let's see. That's two over
18 in the same one.

19 SPECIAL MASTER SCHNEIDER: Oh, there it
20 is.

21 MS. O'DELL: That's correct.

22 MR. BUSH: Your Honor, as you can see,
23 there is like -- you know, I assume we attempted to
24 try to, you know, have our experts look at the same
25 reports that Dr. Longo is relying on. As you can

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1 see, it can be a somewhat difficult process, but
2 these should have a substantial overlap, if not
3 entirely match up.

4 SPECIAL MASTER SCHNEIDER: Yeah. So I
5 mean correct me if I'm wrong, but I think a fairer
6 assumption would be that Dr. Wiley and Dr. Su looked
7 at the Dr. Longo test results where Dr. Longo
8 purports to identify chrysotile asbestos.

9 MR. BUSH: That's absolutely right,
10 your Honor. I mean that's the list that's the title
11 of Appendix 5 is list of MAS reports identifying
12 chrysotile in Johnson & Johnson talcum powder
13 products. I think it's supposed to be a complete
14 list and that's what -- I think we've covered that.
15 That is exactly what it's supposed to be reflecting
16 there.

17 SPECIAL MASTER SCHNEIDER: Okay.

18 Leigh, you know, I don't want to cut
19 you short. Why don't we hear from you.

20 MS. O'DELL: Thank you, your Honor.

21 I just want to go back to a couple of
22 things that have been said. And, Matt, not to
23 suggest anything untoward, but you said that's a
24 complete list. Dr. Su and Dr. Wiley list all the
25 samples that they have -- they planned to comment on

1 Dr. Longo's testings, but his list of sample results
2 that he's relying on in his table is more extensive
3 than their list. I think I just need to point that
4 out.

5 SPECIAL MASTER SCHNEIDER: It looks
6 like, Leigh, do you surmise that what Dr. Wiley and
7 Dr. Su did was just to analyze the test results under
8 the new PLM methodology?

9 MS. O'DELL: For chrysotile. I believe
10 that to be true.

11 SPECIAL MASTER SCHNEIDER: Did both of
12 those experts prepare other expert reports in this
13 case?

14 MS. O'DELL: Not in the MDL for this
15 type of testing.

16 Let me just amend that.

17 Dr. Wiley, as Matt pointed out earlier,
18 in 2019 issued a report related to Dr. Longo's
19 amphibole asbestos testing that used transmission
20 electron microscope, TEM, plus PLM. And that was,
21 you know, a different testing only looking for
22 amphibole asbestos, so that would be like actinolite,
23 anthophyllite, you know, those were the primary
24 findings in those reports.

25 And one of the methods you've seen Dr.

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1 Longo describe is the heavy density liquid separation
2 method. And that method is different if you're
3 looking for amphibole asbestos versus chrysotile
4 asbestos, which is a serpentine mineral. And so I
5 just want to make that distinction clear, your Honor,
6 because when he was, in 2018, doing his testing, he
7 was looking for amphibole. That heavy liquid
8 separation process was different because minerals
9 have different weight. And so Dr. Wiley had a report
10 for that. And then following this interim period
11 when Dr. Longo began to turn his attention to testing
12 for chrysotile, that heavy liquid density separation
13 process was different. Also based on Colorado School
14 of Mines methodology as well as others, but that was
15 different. And so, therefore, it allowed him to
16 separate the talc from the chrysotile and isolate
17 that. And that's what he's been looking at with PLM.
18 And I understand and appreciate that that's what Dr.
19 Su and Dr. Wiley and to some degree Dr. Sanchez are
20 criticizing Dr. Longo in their expert reports.

21 But when you look at each of these test
22 results and they arise under specific cases, some of
23 them were the testing of bottles for specific
24 Plaintiffs from mesothelioma cases, some ovarian
25 case, one ovarian case, and then he also tested

1 samples that were produced in the MDL under the
2 sample-sharing protocol. Some Chinese samples, with
3 two from Imerys, I believe, was the number and
4 several from Johnson & Johnson.

5 And I think that you know when you look
6 at his testing, and we provided -- I'm sorry I had to
7 send you those boxes, but we provided you all the
8 materials that he produced for his reports. And what
9 you see is that in the report it outlines his
10 methodology. That is not Mr. Hess' methodology. Dr.
11 Longo decides the methodology in terms of sample
12 preparation on heavy liquid density separation. He's
13 the one who's prescribed the process for how the
14 samples are going to be tested. Certainly Mr. Hess
15 is the technician that did a lot of the day-to-day
16 PLM work.

17 You know, where there was a question,
18 they discussed it. And Dr. Longo has testified to
19 that. But what comes from Mr. Hess' work are
20 photomicrographs where he is documenting what he's
21 opining on in the count sheets. And it's that
22 information, plus the other methodology that Dr.
23 Longo is employing, that he ultimately relies on to
24 reach his opinions and opines in those cases. And so
25 it's him that's opining on the particular

1 photomicrograph and how he sees it. And so --

2 SPECIAL MASTER SCHNEIDER: I'm sorry,
3 Leigh. Go ahead.

4 MS. O'DELL: Excuse me, Judge, and
5 interrupt any time, but he has been examined
6 extensively on these tests in deposition and he has
7 answered question after question after question on
8 these photomicrographs.

9 Mr. Hess is not going to have anything
10 more than the same photomicrographs in front of him
11 in answering these questions. They're just trying to
12 glean from Mr. Hess information that they can obtain
13 from Dr. Longo. And for whatever reason, they felt
14 they didn't get the answers that they wanted and now
15 they want to depose Mr. Hess. And we feel like
16 clearly, under Rule 26, that that's protected.

17 SPECIAL MASTER SCHNEIDER: In all the
18 other numerous depositions and trials dealing with
19 the issue of whether asbestos is present in talc or
20 cosmetic talc, were the experts just relying on the
21 photomicrographs?

22 MS. O'DELL: Yes, your Honor. And that
23 underlying data.

24 There has not been an instance I'm
25 aware of where a technician from any lab has been

1 deposed, whether that -- certainly not from Dr.
2 Longo's lab, Analytical Services, not from R.J. Lee's
3 lab, which is Matt Sanchez's lab, or any of the
4 others. And it's been the person that has been the
5 testifying expert that's testified to that data.

6 SPECIAL MASTER SCHNEIDER: What weight,
7 if any, Leigh, should be given to what appears to be
8 the only two prior decisions that ruled on whether
9 Hess can be deposed?

10 Obviously I know they're not
11 controlling, but is there anything to distinguish
12 those cases from this case?

13 MS. O'DELL: I think to me the
14 distinguishing factor is the breadth and the scope of
15 inquiring of Dr. Longo. Those were individual cases.
16 And I don't know -- there are so many cases here,
17 Judge, I can't -- I don't know, I'm not saying I
18 would know every underlying fact of a mesothelioma
19 case that arose in another jurisdiction. I don't.
20 But what I do know here is for these cases, excuse
21 me, these results, Dr. Longo has testified it's over
22 23 days, just for these results. And whether it's
23 been at a deposition or at trial, he's been
24 cross-examined extensively. I don't -- that was not
25 the underlying facts in those cases. They were

1 individual cases with one deposition of Dr. Longo
2 where he has been examined ad nauseum. And I think
3 it's important to note here that, for example, if you
4 look at the list that we attached of the reports,
5 Exhibit B, to our -- it's docket 32684. And, you
6 know, one of the test results that Dr. Longo relies
7 on was testing that was done in Curon (ph) Wineries
8 case. He was deposed in that case, he testified at
9 trial in that case and now they had the opportunity
10 to examine him again in the MDL deposition over two
11 days about those particular results. And there are
12 numerous other examples of just that.

13 And I think that that is one thing that
14 distinguishes here, they've had ample opportunity to
15 glean all the information necessary to cross-examine
16 Dr. Longo at trial, to understand what his opinions
17 are, and certainly their experts have issued
18 extensive reports with myriad criticisms and there is
19 nothing that they can get from Mr. Hess that they
20 haven't already gotten from Dr. Longo.

21 SPECIAL MASTER SCHNEIDER: Can I go
22 back to an issue that was touched on?

23 Did J&J get split samples or the word
24 that was used in the briefs, aliquots, if I'm
25 pronouncing it right, of all the samples that Dr.

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1 Wiley and Dr. Su analyzed in their expert reports?

2 MS. O'DELL: I can say, your Honor, for
3 the MDL samples, the ones that were historical J&J
4 samples, yes. Those samples were held at a neutral
5 lab and those are available to Johnson & Johnson.

6 In one of the briefs, and I don't
7 remember at the moment which one, I made the comment
8 for the Plaintiff Steering Committee, I happened to
9 write it about their ability to test these samples,
10 they certainly had that, and they did that in
11 Zimmerman. Zimmerman is a case where that expert
12 report has been disclosed as one of the bases for Dr.
13 Longo's opinions. And Dr. Sanchez tested some of
14 that talc in issued opinions on why he felt it did
15 not contain asbestos and that Dr. Longo was
16 incorrect. So that's always available to them.

17 I am not aware of an instance, and I'm
18 sure Matt can correct me, but I am not aware of an
19 instance where there was no remaining material for
20 Johnson & Johnson to test.

21 SPECIAL MASTER SCHNEIDER: Is that with
22 regard to the MDL samples?

23 MS. O'DELL: That's a hundred percent
24 true for the MDL samples.

25 As to the individual Plaintiffs'

1 samples, I don't have all the details, but my working
2 understanding is that there is material available for
3 everyone. I know for the -- Ms. Newsome, for
4 example, in the MDL, there is certainly material
5 available for them to test of her bottle.

6 SPECIAL MASTER SCHNEIDER: Do you know
7 in the two cases that were cited where Dr. Hess'
8 deposition was permitted to go forward, if, in fact,
9 he's been deposed yet?

10 MS. O'DELL: I do not believe he's been
11 deposed, sir.

12 SPECIAL MASTER SCHNEIDER: Not yet?

13 Mr. Bush, do you have any comments on
14 what Ms. O'Dell had to say?

15 MR. BUSH: Yeah, I have a few comments
16 and then some thoughts of my own.

17 I want to make clear some of the
18 differences first between what was happening in the
19 first round of MDL reports and the second round.

20 Before this new chrysotile testing, the
21 core part of Dr. Longo's opinion and testing was
22 about TEM. So there was a question you had, your
23 Honor, about, well, weren't they all relying on the
24 photomicrographs in the tests. Well, in the past,
25 the core testing was TEM and TEM gives you a lot more

1 objective information. Yes, it gives you a
2 photomicrograph that's black and white, and that's
3 one thing it gives you, but it also gives you --
4 there is two other components of the analysis called
5 PBX and SAED, but basically one of them tells you
6 what proportions of different chemicals there are and
7 different elements, I should say, in the samples. So
8 it's 10 times as much calcium as there is sodium and
9 things like that. So you can see the chemical makeup
10 of a particle. And that's help you identify the
11 mineral type.

12 It also let's you see how the atoms are
13 spaced and the angles between the atoms, and the
14 experts can use known patterns and overlay that on
15 what you see and that determines whether a particle
16 is tremolite or not tremolite or what the mineral
17 type is.

18 So before all this testing, there was a
19 lot more objective information. We had disagreements
20 about it, there are still things that we have to say
21 about it, but it was very, very different. Even
22 throw the PLM analysis in the case was very very
23 different from what's going on now where it's all
24 about these gradations of color and there is such a
25 dispute about the difference -- you know, about what

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1 these colors are.

2 You had asked about what weight to give
3 the prior decisions about Mr. Hess and I think you
4 should give them a lot of weight. I don't think
5 there is any way to distinguish what happened in the
6 last two times Mr. Hess was ordered to have a
7 deposition and this time. It's the same methodology
8 and the same work that Dr. Longo is relying on. And
9 both of those courts recognize that it's Mr. Hess who
10 is the one who is really doing all the work. And I
11 thought the Gref order, the Federal District Court
12 order, said it very clearly.

13 I think there was a question about
14 well, what about his extensive depositions that he's
15 had. And part of the reason he's been -- Dr. Longo's
16 been deposed about this extensively is because his
17 methodology keeps changing over time. So he says
18 iodine is the key to all this. And then two
19 depositions later he says I'm not using iodine
20 anymore. And then he's saying he's relying on
21 different shades of yellow and then it turns out he's
22 using a yellow-orange microscope. So then he's using
23 a different oil. So it's not like we've just sat and
24 asked him the same things over and over again over 20
25 depositions. This is a thing that's constantly in

1 flux.

2 And the real crux of this all, your
3 Honor, is that throughout this all, Mr. Hess is the
4 one who's doing all the work and making the critical
5 decisions. Mr. Hess is the one looking down the
6 microscope. Mr. Hess is the one determining what
7 color the particle is, which is the key step here.
8 Mr. Hess is the one that's assigning our I value,
9 which is how you determine the mineral type from the
10 color. Mr. Hess is the one saying which imaging to
11 produce that's representative. Mr. Hess is the one
12 setting the illumination level and our experts think
13 that they're setting it too low. Mr. Hess is even
14 the one who came up with this idea of using this
15 unique kind of chrysotile as a reference standard
16 instead of the existing reference standard, which Dr.
17 Longo said is the key to unlocking all the analysis.

18 And I think where Dr. Longo's analysis
19 and the argument falls apart here is Dr. Longo is
20 testifying over and over again that you have to look
21 live down the microscope to identify particles. But
22 except on rare occasions, Dr. Longo is not the one
23 who is looking down the microscope. So Dr. Longo
24 really doesn't have a basis to give these opinions
25 for himself. Everything is stemming from Hess. Hess

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1 is the one reaching the conclusions and they're just
2 being fed into this report for Dr. Longo to parrot.
3 He can't reach an independent assessment of these
4 because he says so himself when we asked isn't your
5 entire analysis wrong, he says, well, I have to be
6 sitting at the microscope. But he's not sitting at
7 the microscope. Mr. Hess is. So where does this
8 come from? You know, I would say it comes from whole
9 cloth because he's relying on something he hasn't
10 looked at, but it's not whole cloth. It's coming
11 from Mr. Hess.

12 And so we want a deposition of Mr. Hess
13 for the same reasons the last two courts granted a
14 deposition of Mr. Hess, because we want to hear from
15 the person who actually did the work, who is actually
16 reaching the conclusions that are calling this
17 chrysotile why he's doing this. And they're answers
18 that Dr. Longo is not able to give himself because
19 he's not the one looking down the microscope.

20 SPECIAL MASTER SCHNEIDER: Let me ask
21 you this question, Mr. Bush.

22 It appears that J&J has engaged at
23 least two world class experts, Dr. Wiley and Dr. Su,
24 to opine on Dr. Longo's tests. I read those reports
25 and I can't speak to who is right and who is wrong,

1 and that's not an issue I'm going to weigh in on,
2 that's for the trial judge. But it was a
3 comprehensive analysis. They were able to completely
4 critique Dr. Longo's opinions. They reached their
5 conclusions and I didn't see one mention in those
6 reports that somehow the body of work that they were
7 given to review was incomplete or that they needed to
8 hear from Mr. Hess to evaluate Dr. Longo's opinions.

9 Given that the experts appear to have
10 been able to fully evaluate Dr. Longo's work product
11 and to submit extensive expert reports, why then is
12 Hess' deposition necessary?

13 MR. BUSH: Yes, your Honor, because we
14 certainly have a lot of criticisms of Dr. Longo's
15 method and his reports and expressed in Dr. Su and
16 Dr. Wiley's reports. But Dr. Longo's response to
17 those is to say trust me, you just have to look down
18 the microscope. And he's not the one who's doing
19 that.

20 And so this isn't just for Daubert.
21 It's important for the Rule 702 hearing, but it's
22 also important for a jury later on essentially. If
23 our experts say, well, here are all our criticisms
24 and Dr. Longo says, well, trust me, you just have to
25 look down the microscope, then that puts us at an

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1 impasse. And the one who actually looked down the
2 microscope who did the work is Mr. Hess. And so
3 yeah, we're able to have criticisms of what he's done
4 based on the information that we have, but the core
5 person -- I mean usually in litigation you are
6 entitled to a deposition of the person, of the expert
7 who's reaching the adverse opinions. And the person
8 who is really reaching the adverse opinions here is
9 Mr. Hess. And so that's why we want a deposition of
10 him. And Dr. Wiley and Dr. Su's report, we think
11 they're really good obviously, but a deposition of
12 Mr. Hess is going to be crucial because he's the one
13 who's actually doing the work looking down the
14 microscope. He's the one who's saying there is
15 chrysotile in a hundred percent of the samples. And
16 that's just feeding into Dr. Longo's report who is
17 expressing it in front of the jury. So all the
18 substance of the work here is being done by Mr. Hess.

19 SPECIAL MASTER SCHNEIDER: Didn't Mr.
20 Hess do the testing and the PLM microscopic analysis
21 for all the PLM testing that Dr. Longo previously
22 relied upon under the old method and also the TEM
23 tests?

24 MR. BUSH: He did not do the TEM tests
25 last time. Those are the TEM analysis -- the TEM

1 analysts did the TEM tests last time. He did do the
2 PLM work last time, but there wasn't the same dispute
3 about what exactly is happening in these photos, what
4 are the different colors here. It's the totally new
5 methodology that's the reason we need to depose Mr.
6 Hess. And I think what that shows is actually we're
7 not just willy-nilly going around and asking to
8 depose every single analyst there. We didn't ask to
9 depose the TEM analysts. We didn't ask to depose Mr.
10 Hess the first time around when there wasn't a real
11 need to. But now we're really locked in a dispute
12 about there are these colors that you're calling
13 yellow, that they're yellow and you're calling them
14 purple, and Dr. Longo is saying yeah, you just got to
15 look down the microscope, which is the thing that Mr.
16 Hess did.

17 So we're at a point where it's really
18 important to depose Mr. Hess where it wasn't before.
19 And I think what that shows is we're being selective
20 and we're doing it where it's important. And the way
21 this testing and litigation has developed, it's come
22 to a head that this is all about what you see when
23 you look down the microscope. It's how Dr. Longo is
24 defining his methods, that the critical moment that
25 you can tell whether something is asbestos or not or

1 talc or not is the moment you're looking down the
2 microscope. And Dr. Longo is not the one who did
3 that. Mr. Hess is. So we want a deposition of Mr.
4 Hess to talk about what he did and the analysis that
5 he did.

6 SPECIAL MASTER SCHNEIDER: Leigh, all
7 my questions have been raised and answered.

8 You're the moving party. I want to
9 hear from you first. I want to turn the floor over
10 to you to say anything you want to say. We'll hear
11 from Mr. Bush in response and you'll have the last
12 word because it's your motion.

13 MS. O'DELL: Thank you, your Honor.

14 What I would say in response to what
15 Matt has just said is in the first round of testing
16 in the MDL, analysts did work for TEM and PLM and
17 that work was relied on by Dr. Longo and Dr. Rigler
18 in rendering their opinions. That method of relying
19 on analysts is true for Dr. Sanchez in the R.J. Lee
20 lab. He does not do the day-to-day testing. He
21 doesn't live near the lab. He lives in Utah. The
22 lab is back east, and I think it's Pennsylvania. And
23 the analysts do the testing and he relies on their
24 work and their data and renders opinions. That is
25 the generally accepted method in this industry. And

1 that's what Dr. Longo has done here.

2 For two-and-a-half years they have
3 opined -- J&J's experts have opined on Dr. Longo's
4 results without, you know, seeking the deposition of
5 Mr. Hess or, frankly, seeking to inspect the lab.
6 And they have had full opportunity to criticize and
7 critique his opinions. And so both of these efforts
8 to -- wanting to depose Dr. Hess, and I know we're
9 going to get into the other motion soon, but they are
10 efforts to undermine Dr. Longo's opinions. I dare
11 say harass Dr. Longo and they're not appropriate
12 under the rule.

13 What he's relying on has been
14 disclosed. He has been -- it's been very clear and I
15 want to go to one particular thing Matt has said a
16 number of times, the methodology continues to change.
17 And methodology is an issue for the 702 Motion, it's
18 not for today. But I think it is important just to
19 make the record clear that in each of his underlying
20 reports, he describes the methodologies he has used
21 for that testing. And it is disclosed in detail and
22 his results are disclosed and he's been deposed on
23 them. So this idea that somehow if you tweak
24 something for later test is inappropriate, that's not
25 true. And because as long as you disclose what

1 you're doing, he has done that.

2 And then lastly, I would just reiterate
3 that there is protection under Rule 26(b)(4)(D) for
4 underlying employees of an expert's lab or other
5 institution to protect them from discovery
6 depositions because it just disrupts and it is an
7 undue burden for Dr. Longo's lab, for Dr. Longo, and
8 certainly for Mr. Hess. And so for these reasons,
9 your Honor, we think that the motion for protective
10 order should be granted.

11 SPECIAL MASTER SCHNEIDER: Matt, last
12 word.

13 MR. BUSH: Thank you, your Honor.

14 Here is the last word. I just want
15 to -- if I may share my screen again quickly. I
16 think this may come up in the next argument too. But
17 I just want to sort of put a fine point on what is
18 happening here.

19 This is from the Clark hearing, so it's
20 a Rule 104 hearing which is like a Rule 702 hearing,
21 but in state court.

22 So this was only ten days ago and this
23 is a particle, this one that I circled, that Dr.
24 Longo is calling chrysotile. And the way he's
25 calling this chrysotile is because he's saying that

1 he's treating this as purple. And the reason he's
2 treating this yellow particle as purple is because
3 they're claiming to see some sort of purple around
4 the edges. All these other particles around it that
5 look similar are talc, indisputably talc.

6 And so we asked them, well -- and you
7 can see even in this, and we put images that you see
8 the same sort of edge effect that Dr. Longo said he's
9 not sure if it's actually part of the particle or
10 just an artifact of the imaging being produced.

11 And so we asked him, well, if you're
12 claiming to see some sort of edge effect here and
13 you're basing your purple color on that just effect,
14 but it's an artifact, meaning it's not really there,
15 it's just part of the imaging, then isn't your entire
16 analysis wrong? And he says, this is his answer, no
17 this analysis is not wrong. This is chrysotile and I
18 would need to be looking at the microscope here. I
19 stand by this and it's not wrong. But he's not
20 standing by it, he's standing by what Mr. Hess saw
21 down the microscope because Dr. Longo is not looking
22 down the microscope. Mr. Hess is.

23 And so I think -- and Leigh mentioned
24 Rule 26(d)4d and we discussed this extensively in the
25 briefing, so I don't want to get into it, but to say

1 that exceptional circumstance don't apply when the
2 work of the assistant is just fed in and forms the
3 substance of the testifying expert report.

4 And I think the Gref opinion makes this
5 really clear that whether you say that the
6 exceptional circumstances standard doesn't apply or
7 whether you say it's met here, it leads to the same
8 place when a testifying expert is relying so heavily
9 on the substance and the opinions of the
10 non-testifying expert.

11 And what the Gref court said is whether
12 the Court considers Mr. Hess a consulting expert
13 employed only for trial purposes, a non-testifying
14 consultant who's work was reviewed by a testifying
15 expert, or simply a fact witness, exceptional
16 circumstances exist to allow his deposition and the
17 subpoena imposes no undue burden on him.

18 It's the exact same methodology in
19 testing there that's at issue here and the burden now
20 is even less because we're happy to coordinate with
21 the Defendants' in that case who we know and so we
22 can do this deposition once at one time rather than
23 having multiple depositions.

24 So if this deposition is happening in
25 that Gref case, we can coordinate to make sure that

1 Mr. Hess doesn't have to do this twice over. So we
2 think this Court should rely on the fact that Mr.
3 Hess' deposition has been ordered now twice and it
4 imposes now there is even a lower burden on him for a
5 deposition because it's going to be happening anyway
6 and we're not a Defendant on that case, so we're not
7 entitled to ask questions there. So we can order
8 these at the same time to lower the burden. And I
9 think these courts are recognizing that Mr. Hess is
10 the one who's really doing the work and that's why we
11 believe we're entitled to a deposition.

12 SPECIAL MASTER SCHNEIDER: All right.
13 Leigh, it's your motion, you have the last word.

14 MS. O'DELL: Your Honor, I would just
15 take you back to the Clark hearing. And you saw an
16 excerpt from the Clark hearing in the PowerPoint that
17 Matt put up. And in the Inspection Motion they go
18 through some other quotes, and I would just direct
19 you to the whole discussion. They point out -- it
20 was page 119 that Matt pointed out, but it goes back
21 further to page 110 and others where they have had a
22 thorough examination of the photomicrograph. He has
23 commented on the color, magenta versus yellow. He
24 says this has no relationship to the 1866Bs. So he
25 says I -- he is talking about what he is opining on

1 based on the color, which is the refracted indices
2 and it leads him to the decision about whether it's
3 chrysotile or not.

4 But there are certain points in that
5 colloquy where he gets down to a specific question,
6 he just says I can't go there, I need to see that.
7 That's not saying I refuse to answer. That's not
8 saying I'm relying totally on Mr. Hess and, you know,
9 essentially I'm parroting what is coming to me.
10 That's him describing what he's relying on and how he
11 reaches his result.

12 And for these reasons, and I won't
13 belabor it, Judge, we feel like a deposition is not
14 appropriate. And whether it's coordinated with
15 another Defendant or not, I can't to speak to that,
16 I'm not in communication with other Defendants, but
17 we feel like just the rule itself should not be that
18 these underlying technicians are subject to
19 depositions or all of them are going to be deposed.
20 I mean whether it's any other testing experts who
21 have underlying technicians, which they all do,
22 because of the time that it takes, the extensive time
23 it takes to examine these samples under the
24 microscope, you know, two to six hours. And that's
25 not even including the sample preparation.

1 And so we believe it's not warranted
2 and we urge the Court to grant our motion.

3 Thank you.

4 SPECIAL MASTER SCHNEIDER: Thank you,
5 Counsel.

6 The record is closed on the Hess
7 motion.

8 Like I said, I'm going to take it under
9 advisement, but you will get a prompt decision.

10 We're going to turn to the Inspection
11 Motion, but can I suggest we just take a ten-minute
12 break, stretch our legs, come back and then we'll get
13 to that motion.

14 Is that okay, Theresa?

15 (Court reporter responds.)

16 Okay. So why don't we come back in ten
17 minutes and then we'll have oral argument on the
18 Inspection Motion.

19 (Recess is taken.)

20 SPECIAL MASTER SCHNEIDER: Okay. This
21 is now argument on the Inspection Motion.

22 Matt, if you'll indulge me, I have
23 certain questions.

24 MR. BUSH: That's what I was expecting,
25 your Honor.

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1 SPECIAL MASTER SCHNEIDER: So let me
2 cut to the chase, Matt.

3 I'm sure you had an army of attorneys
4 looking for case law to support the unprecedented
5 request made in Defendant's motion. And what I saw
6 was that you cited three cases.

7 One case, there was the second
8 inspection because there was a sanction resulting
9 from the first inspection.

10 The second case was a criminal case
11 that had absolutely nothing to do with the federal
12 rules of civil procedure.

13 And the third case was a routine
14 inspection of a manufacturing process.

15 What legal support is there for the
16 unprecedented relief that you're asking for in this
17 case?

18 MR. BUSH: Yes, your Honor. I mean I
19 think you -- well, first of all, we may not have as
20 large an army as you may imagine in your head, but I
21 think -- I would, as you might imagine, not
22 characterize the relief we're asking for as so
23 unprecedented.

24 SPECIAL MASTER SCHNEIDER: Let me ask
25 you something, Matt. I don't mean to interrupt, but

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1 if it wasn't unprecedented, why can't you cite a case
2 where the relief was granted?

3 MR. BUSH: Well, what I want to point
4 you to, your Honor, is where this happened -- I agree
5 this is a rare situation and we are in a unique
6 position that's driven in part by Dr. Longo's unique
7 methodology.

8 But I want to turn your attention to is
9 we have a footnote, footnote five, of our reply brief
10 where we cite a lot of examples where an expert was
11 permitted to observe another expert's work. It often
12 happens in testing. The most common situation,
13 although not all of them are like this, is
14 destructive testing. So you want to take whatever it
15 is, I think one of them was a ladder that someone
16 claimed that they fell on. One was a car that was in
17 a car accident that they wanted to do sort of a cash
18 test on. That's the most common situation. And what
19 usually happens, the most common situation that
20 happens is the party proposes in advance to do
21 destructive testing and then part of that almost
22 invariably is to have both experts be there at the
23 same time because of the whole concept that once you
24 do it once, you're not going to be able to recreate
25 it.

1 This is a slightly different situation
2 because Dr. Longo did all that testing, not in the
3 context of the MDL, and then incorporated it into his
4 report here. So it's certainly not -- while I
5 certainly agree that most of the time each expert is
6 allowed to do their own work sort of on their own
7 without someone looking over their shoulder, it's not
8 too uncommon when the testing requires it to have the
9 experts do something together where they're both
10 looking at the same thing at the same time.

11 SPECIAL MASTER SCHNEIDER: I don't mean
12 to interrupt, Counsel, but we heard just a few
13 minutes ago that with regard to the MDL samples, that
14 your clients have -- I'll call it a split sample.
15 The fancy word that you used in the briefs was
16 aliquot, if I'm pronouncing it right. So there is no
17 destructive testing here. You have what the
18 Plaintiffs tested. So your client if it so chooses,
19 can do the exact same tests that Dr. Longo did.
20 There is no destructive testing in this case.

21 MR. BUSH: I just want to make one
22 clarification. I'm not sure -- and then get to the
23 core of your question. Just a small clarification is
24 that for the MDL samples, Dr. Longo has not tested
25 any of those samples that were split pursuant to this

1 MDL using this new PLM method.

2 There was a whole process many years
3 ago of getting all these samples from the J&J archive
4 and splitting them, I think they were split in person
5 at a neutral lab, and not one of those has been
6 testified for the new PLM -- using the new PLM
7 method.

8 SPECIAL MASTER SCHNEIDER: Hold on.
9 Let's straighten this out.

10 You said TEM. We're talking about the
11 new PLM method. The non-MDL samples, are you saying
12 that your clients didn't get split samples of those?
13 They don't have the opportunity to test?

14 MR. BUSH: Your Honor, that's not what
15 I'm saying. And as we pointed out in our brief and
16 Leigh said, you know, some of these samples we have
17 tested. I just know in the course of the state court
18 litigation sometimes things move very quickly because
19 they're preference cases, you know, people who --
20 where the litigation has to move very fast and so
21 sometimes -- you know, there are times when there is
22 not enough time to test the sample split or maybe a
23 case resolved in the middle of it and that sample is
24 never tested.

25 But my point is not -- I just wanted to

1 make the clarification about the MDL samples because
2 that -- those are certainly the easiest to test in a
3 way that everybody has access to. Every time
4 something new is tested, we have to go through a
5 whole process of splitting it. I just wanted to make
6 that small clarification, but I really want to answer
7 your main question, how is this really destructive
8 testing? And it's a combination of two things.

9 We can test other talc from the same
10 sample, potentially, and look at that, but what we
11 can't evaluate is the particular talc or the
12 particular particle that Dr. Longo and Mr. Hess are
13 looking at and calling them chrysotile.

14 So we can have other particles from the
15 same container, but what happens is they put the
16 samples on a slide, the slides they look at and then
17 they degrade and they're discarded. And so the
18 very -- the exact particles that they're saying are
19 chrysotile, we do not have an opportunity to test.

20 SPECIAL MASTER SCHNEIDER: Mr. Bush,
21 Mr. Bush, everyday, every single day split samples
22 are taken and destructive tests are done. So I
23 remember way back when, when I was on the bench, we
24 had a case where a roof collapsed and there was a
25 question about whether a metal piece was defective or

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1 not. So each side got a piece of that metal and they
2 were able to test it. Okay? Each side did their own
3 tests and came to the same conclusion. And it
4 destroyed the metal. Right? But that's not a
5 destructive test if each side can test the same exact
6 thing.

7 MR. BUSH: Your honor --

8 SPECIAL MASTER SCHNEIDER: A routine
9 case like that, that's about as routine as you get.
10 It happens hundreds, probably thousands of times a
11 year. If the Court permitted the inspection in this
12 asbestos case, then if a defense expert wants to
13 cross-examine a plaintiffs' expert about whether they
14 determined a nail was defective, even though they had
15 a sample of that nail, you're saying they should be
16 permitted to observe that?

17 MR. BUSH: No, your Honor. I'm saying
18 it's the combination of two things. It's the fact
19 that we can't look at the exact particle that he's
20 calling chrysotile, and the fact that he's saying the
21 only moment that you can determine whether this is
22 asbestos or not is those very moments I'm looking
23 down the microscope.

24 So I don't know the example of the
25 metal that you're referring to, so I don't want to

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1 sort of misrepresent what of happened there and it's
2 tough for me to come up with an analogy. But if one
3 of the experts had said, oh, trust me, the only way
4 you can determine if the metal was defective is if
5 you're staring on my, you know, testing facility and
6 you're looking at it then, because the records that I
7 create for you aren't enough. That's a different
8 scenario.

9 And so we can't look at the particles
10 that Dr. Longo is looking at because they've long
11 since been discarded despite our efforts to obtain
12 those slides, and the fact that Dr. Longo is saying
13 there is a fleeting moment when you can determine
14 whether these particles are asbestos or not. That
15 fleeting moment is when I or really Mr. Hess is
16 looking down at the microscope. And that's how Dr.
17 Longo is defining his methodology, that's how he's
18 responding to questions. So if he's going to say the
19 time where you can determine whether a particle is
20 asbestos or not asbestos is just looking live down
21 the microscope, then that's why we want an
22 opportunity to look live down the microscope at the
23 same time. And so this is a very unique situation
24 where Dr. Longo is saying there is this sort of
25 transitory time where this test can be done in a way

1 that can be independently verified. And I think
2 that's different from most of the split sample cases
3 that may be out there. So I don't think that this is
4 a huge slippery slope to having it happen in all
5 cases.

6 There is really unique testimony here
7 and really unique indicia that there is something
8 going on here and that's why, you know, particles
9 that are yellow are being called purple. There is a
10 lot of uniqueness about this case that I don't think
11 creates a slippery slope down to a lot of other
12 cases.

13 SPECIAL MASTER SCHNEIDER: So let me
14 quote from your client's briefs.

15 The briefs argue that it's critical to
16 the defense of the case to have this inspection and
17 the, quote/unquote, only way to gauge the accuracy of
18 Longo's conclusions is to have this inspection.

19 How does that square with the fact that
20 these world class experts have submitted the
21 comprehensive expert reports taking Longo's tests and
22 methodology to task? If these tests are so critical
23 and the only way to defend the case, wouldn't you
24 expect the experts to say we need X, Y, Z information
25 in order to do our work? They haven't done that.

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1 Instead, they produced pretty -- I really can't speak
2 to whether they're right or wrong, but it appeared to
3 me, at least, that the experts produced pretty
4 comprehensive reports and never said a word, not one
5 word, that they needed to have this inspection to
6 complete their analysis.

7 How do I weigh that in evaluating
8 whether to grant this motion?

9 MR. BUSH: You weigh that because it's
10 important for the Daubert motion, but it's also -- I
11 think it's the same answer I gave in the last
12 hearing, which is it's important for the Daubert, but
13 it's also important for any jury trial.

14 We make these -- we cross-examined Dr.
15 Longo's on these topics and he has responses. I mean
16 if you were going to say those, you know, those
17 reports are so good, you know, like it's so clear
18 Longo can just get excluded and we can all be done
19 with that, then sure, that would be one thing. But
20 we don't know where this is going. The defense is
21 always going to have criticisms that they think are
22 strong of the expert, but Dr. Longo's response is to
23 basically say, trust me, when you look down the
24 microscope, then you can tell whether it's asbestos
25 or not. And, for example, one of Dr. Su's criticisms

1 is that the illumination is wrong. And one thing he
2 does is he takes the images that Dr. Longo has
3 produced and turns the illumination up digitally
4 using a computer to show the differences. And what
5 Dr. Longo says is, you know, basically that's
6 hocus-pocus. He shouldn't be photo-shopping my
7 imaging. I mean he even says, you know, Dr. Su is in
8 China, how can he be doing this so far away from the
9 microscope? That's literary what he said at the
10 Clark hearing only ten days ago.

11 And so the fact that our experts have
12 criticisms of Dr. Longo, are able to criticize Dr.
13 Longo based on what he's produced, doesn't mean that
14 that's the end-all-be-all, particularly when the way
15 Dr. Longo's responding to those criticisms is saying
16 trust me, you just have to look down the microscope
17 in this moment.

18 And that's what we don't have the
19 opportunity to do.

20 SPECIAL MASTER SCHNEIDER: Matt, I
21 didn't use the words critical to the defense. I
22 didn't use the words the only way to gauge the
23 accuracy of Longo's conclusions is to have this
24 inspection. Are the Defendants' standing on that
25 argument, that's still their argument?

1 MR. BUSH: Absolutely, your Honor.

2 Dr. Longo, the way he's defending his
3 results, puts a total impasse on further questioning.

4 We say, isn't this particle yellow, how
5 are you calling it purple.

6 And he says, well, I need to look down
7 the microscope. And he says I'm relying on the
8 edges.

9 And we say, well, aren't there edges
10 around all these particles, even the one you're
11 calling talc?

12 And he says, well, I don't know if it's
13 an artifact or not, I need to look down the
14 microscope.

15 What I just said is, you know, isn't
16 your entire analysis wrong if you're relying on these
17 artifacts. Oh, just trust me, I stand by it when
18 you're looking down the microscope.

19 There is no follow-up question to ask
20 to that. If he's just saying trust me, when you look
21 down the microscope, I can tell you that that's
22 chrysotile and that's not talc. That's his
23 testimony. That's what he's defining the methodology
24 as, and that just puts everything at an impasse.

25 If we're cross-examining Dr. Longo in

1 front of a jury, it's just stuck there. We can't go
2 further and say -- because he's saying, you know,
3 just if you look down it -- when I look down it, you
4 would be seeing something different. So it is
5 critical.

6 We have other criticisms that we think
7 are good, but this is where, over the course of this
8 changing methodology, different oils, iodines or not,
9 different types of oils, different light bulbs, they
10 keep moving and removing and part of it is in
11 response to our criticisms, Dr. Longo will change
12 something in our view because what he was doing
13 before wasn't supportable. It's narrowed and
14 narrowed and it's gotten to the testing where he just
15 says, trust me you have to look down the microscope.
16 And there is nowhere to go from there. So it is
17 critical in the defense of the case to be able to
18 look down the microscope like he's doing.

19 If he's saying when you look down the
20 microscope, you don't see yellow, you see purple,
21 then we want to be able to do that too and see if
22 that's really true.

23 SPECIAL MASTER SCHNEIDER: So let me
24 ask you a few more questions and then we'll get to
25 Leigh.

1 There is a document request in the
2 notice of inspection. It hasn't been raised in the
3 briefs. Do I take it that that's not an issue with
4 this motion?

5 MR. BUSH: I agree -- this is the Longo
6 notice of deposition. Yes, your Honor. There is no
7 document request that is -- that's at issue in this
8 motion.

9 SPECIAL MASTER SCHNEIDER: All right.
10 So I have the notice of inspection in
11 front of me. It appears that the first two requests
12 are not, you know, looking over the shoulder, so to
13 speak, of Longo, but you just want your experts and
14 probably counsel to just walk through the lab, right?

15 MR. BUSH: Your Honor, sorry, I didn't
16 know where this was going. Let me try to maybe
17 narrow this down.

18 And maybe we could have made this
19 clearer, but at the end of our motion, we have the
20 three requests that we're really relying on.

21 I can -- let me pull it up because I
22 have it in front of me.

23 So I know their initial requests were
24 broad and we're trying to narrow the dispute. And we
25 narrowed it to three requests that we think we really

1 need. And so those are on page 15 of our motion.

2 So we wanted --

3 SPECIAL MASTER SCHNEIDER: Let me take
4 a look. I have --

5 MR. BUSH: Yeah, sure.

6 The conclusion lists the three requests
7 that we're standing on.

8 SPECIAL MASTER SCHNEIDER: Okay. Let's
9 talk about those.

10 MR. BUSH: Yep.

11 SPECIAL MASTER SCHNEIDER: You want to
12 look at the PLM microscopes, right?

13 MR. BUSH: Yes, that's correct.

14 SPECIAL MASTER SCHNEIDER: How do we
15 know those are the same microscopes that were used
16 for the tests at issue?

17 MR. BUSH: I don't think there is
18 any -- I mean I know the light bulb in one has
19 changed, but I don't think there is any evidence that
20 a PLM microscope has been discarded or destroyed over
21 the course of this time.

22 We want to see -- I mean I don't know
23 what else we can ask for other than to see the
24 microscopes that are still there.

25 SPECIAL MASTER SCHNEIDER: I'm not

1 asking for speculation.

2 You want to look at the PLM microscopes
3 that are there. What if those PLM microscopes aren't
4 in the same condition or were changed from when the
5 tests at issue were done?

6 MR. BUSH: Your Honor, my understanding
7 is that the PLM microscopes that are at PLM are the
8 ones that Dr. Longo and Mr. Hess have relied on for
9 their reports.

10 SPECIAL MASTER SCHNEIDER: I'm not
11 asking for your understanding. I'm asking for
12 evidence.

13 Is there evidence that the PLM
14 microscopes that are currently at the lab are in the
15 same exact condition as they were when the tests at
16 issue were taken? That's what I want to know. I
17 don't want to know your understanding.

18 MR. BUSH: I think the evidence is he's
19 using these PLM microscopes over the course of all
20 this time. I don't know why I should be -- the
21 burden should be on me to speculate that something
22 has changed.

23 Dr. Longo has a lab, yeah, he uses
24 these microscopes, the microscopes are there. There
25 is certainly no evidence that something has changed

1 or been destroyed.

2 The way this works is he has a set of
3 microscopes. He says, I have the best PLM setup in
4 the world. So those are the microscopes, at his lab,
5 are the ones that he's using for this report. So I
6 don't think there is any reason to think that
7 anything has been changed or in a different condition
8 or discarded. And if they are in a different
9 condition, if something happened to them like that
10 would affect the testing, then that's even more
11 reason for -- that's even more reason for the
12 inspection.

13 But the key reason we want to look at
14 the microscopes is because of this issue -- the main
15 issue of the light bulb changing. We want to
16 understand what exactly are the microscopes being
17 used and how is that potentially affecting the
18 lighting which affects the color which is the key to
19 this analysis.

20 SPECIAL MASTER SCHNEIDER: I have to
21 respectfully disagree with you that the condition of
22 microscopes is not an issue here. In my view, the
23 burden, if you want the inspection, the burden is on
24 the moving party.

25 If the conditions that you want to

1 inspect are not the same as the conditions that
2 existed when the tests were conducted, in my view,
3 the inspection is irrelevant. So it's not the burden
4 of Longo or MAS to show that there was a change. The
5 burden is on the moving party to show that the
6 conditions are the same.

7 You want to walk into his lab and look
8 at his microscopes without telling me that it's the
9 same microscope in the same condition as the tests
10 that were done that are at issue in this case.

11 MR. BUSH: Your Honor, I just think --
12 first of all, if something had changed, I don't know
13 how we're expected to have evidence of that.
14 Certainly the plaintiff didn't submit evidence that
15 something has changed.

16 SPECIAL MASTER SCHNEIDER: Didn't you
17 depose Longo?

18 MR. BUSH: We've deposed Longo, your
19 Honor, and I can look through his transcript and we
20 can find where he said exactly what microscope he
21 uses, but the microscopes that are in his lab are the
22 ones that he's using. That's the microscopes that
23 are at issue here.

24 He's saying I got this great lab, we
25 looked at our PLM microscope, and you can see that

1 this is asbestos. It's the microscopes that he's
2 relying on for the testing. It's the same one.

3 SPECIAL MASTER SCHNEIDER: Okay. So
4 let's get to number two.

5 MR. BUSH: Sure.

6 SPECIAL MASTER SCHNEIDER: Number two
7 is you asked for the methodology for preparing the
8 materials.

9 So tell me exactly what you want to
10 happen.

11 MR. BUSH: What we want to happen is
12 for an expert to watch sample preparation and
13 analysis of the samples. So there would be a sample
14 preparation stage where we observed so we can watch
15 the analysis from start to finish. And then the key
16 component of what we're requesting is for our experts
17 to be able to look down the microscope and look at
18 the particle that Dr. Longo or Mr. Hess is saying is
19 chrysotile. If they look the down the microscope and
20 say we found chrysotile, our experts look at the same
21 thing so they can see the same particle at the same
22 time at this moment that Dr. Longo has said it's so
23 critical. And that's the key component of what we're
24 requesting.

25 SPECIAL MASTER SCHNEIDER: Okay. Let's

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1 just focus on number two because I think you develop
2 this in number three.

3 MR. BUSH: Yes.

4 SPECIAL MASTER SCHNEIDER: Who does the
5 preparation? Is it Mr. Hess?

6 MR. BUSH: Mr. Hess does the
7 prescription from start -- yes, he does the
8 preparation and through the analysis, so he's doing
9 it from start to finish.

10 SPECIAL MASTER SCHNEIDER: So is what
11 you want to happen is Mr. Hess takes some material to
12 test and he does whatever he does. And while there,
13 your experts and your counsel and someone with a
14 videotape or camera takes a picture and video of what
15 he's doing, is that what you want for both?

16 MR. BUSH: Yeah. We want a -- in short
17 answer, yes, your Honor. We would to be able to
18 watch the method from start to finish, including the
19 videotape. And that includes the preparation time.

20 SPECIAL MASTER SCHNEIDER: So what
21 materials do you want to be prepped?

22 MR. BUSH: A sample of talc to be
23 tested just like Dr. Longo does in his methodology.

24 SPECIAL MASTER SCHNEIDER: What sample
25 of talc? Any sample of talc?

1 MR. BUSH: It could be any sample of
2 talc. We have all these MDL samples that we've been
3 talking about that we have split samples on. I'm
4 sure we can come to an arrangement with the Plaintiff
5 about picking one.

6 But yeah, he's claiming to find
7 chrysotile in a hundred percent of samples. We
8 submitted a chart, it was as of February of 2023, 125
9 chrysotile tests, 125 positives. He's finding it a
10 hundred percent of the time or nearly one hundred
11 percent of the time. And so let's just test the
12 sample. We should probably do it with an MDL sample
13 that we spent so much time splitting on that he
14 hasn't tested so far. We can go buy one off the
15 shelf, too.

16 SPECIAL MASTER SCHNEIDER: All right.
17 So let me ask you this question, and I was very
18 careful to take down verbatim what you said earlier
19 today in the oral argument.

20 You said, the methodology keeps
21 changing and it's a moving target. You said the
22 methodology is constantly in flux and the methodology
23 keeps changing.

24 So what are you asking, Mr. Bush? Are
25 you asking Mr. Hess to do the current methodology

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1 that the lab uses or are you asking Mr. Hess to
2 repeat the methodology for each of the tests that are
3 at issue in Dr. Longo's reports which are going to be
4 numerous?

5 MR. BUSH: Just the current
6 methodology. What they think is the latest, greatest
7 best way to test chrysotile for asbestos.

8 SPECIAL MASTER SCHNEIDER: Okay. So
9 let's just assume for the sake of argument that what
10 you argued is true, that the methodology is changing.

11 So then wouldn't it be true that the
12 current methodology is different than, say, the
13 methodology that occurred in the 2020 test?

14 MR. BUSH: It would be true, your
15 Honor, but that -- it would be different, but we want
16 it and what Dr. Longo and Mr. Hess say is what they
17 think right now is the best way to test chrysotile
18 for asbestos. It has changed over time. In their
19 view it's been improving over time. And so we want
20 what we have now as what they think is the way to
21 test talc for the presence of chrysotile.

22 SPECIAL MASTER SCHNEIDER: So just so I
23 understand it, I don't want there to be any
24 misunderstanding, you're asking to observe and
25 videotape and photograph a methodology that's

1 currently used that in all likelihood was not used on
2 the samples that are at issue in this case?

3 MR. BUSH: No. That's not right, your
4 Honor. It's the latest samples that are at issue,
5 we're going to have the latest iteration of the
6 methodology.

7 So yes, there is things that happened
8 in the past that we think made it even worse, but we
9 don't need to test the methodology that he's saying
10 isn't right anymore. We want to test the methodology
11 that he's currently saying is the right one that he's
12 using for the current iteration of samples. So I'll
13 say whatever the last two were.

14 There are slight changes, but the core
15 of methodology is the same. What we don't want to
16 happen is for someone to later say, oh, well, you
17 didn't do this the right way. We want the sample as
18 he is currently saying is the best way to do it. And
19 the fact that the methodology is in flux I don't
20 think is a reason to not do the inspection. It's a
21 reason why we want to be there and see them doing the
22 methodology the way they say is the best way to do it
23 right now.

24 SPECIAL MASTER SCHNEIDER: I guess what
25 I'm having trouble with is this, Mr. Bush: You're

1 asking to observe a methodology that was not used on
2 the tests that are at issue in this case so that you
3 can give an opinion on the methodology that wasn't
4 used?

5 MR. BUSH: That's just not right, your
6 Honor. The key is using the methodology, the most
7 recent set of samples is the methodology -- the most
8 repeat set of testing on those samples is the
9 methodology he's using.

10 Yes, in the past it used to be
11 different, but there is a methodology now and it's
12 the methodology that he's been testing. And the core
13 of it is the same, which is I'm going to look at
14 these particles, I'm going to look at the edges, I'm
15 go to say something is purple there and I'm going to
16 do a calculation based off of that. This is the
17 methodology that he's -- what we want to see is the
18 methodology that he's relying on for the MDL testing.

19 SPECIAL MASTER SCHNEIDER: I guess what
20 I'm having trouble with is really grasping this
21 argument. Because in addition to what you stated at
22 oral argument earlier today, quoting from your brief
23 it says as follows, quote: Dr. Longo's methodology
24 cannot be replicated because it is constantly in
25 flux, close quote. Your brief at page 12.

1 So you're asking about a methodology
2 that wasn't used on the samples that he's going to
3 testify, right?

4 MR. BUSH: No, your Honor. I have the
5 same answer, which is the methodology has changed
6 over time. We don't want there to be a situation
7 where we do something and he says, oh, that was
8 something old and I've done something different now.
9 He has a methodology that he's relying on and that's
10 what he's relying on for this testing.

11 The samples that -- the images that
12 I've shown and that we have for the Valadez report,
13 that's just methodology right now.

14 Yes, it changed in the past, but this
15 is the methodology that he's using for his report in
16 this MDL right now. And so we want to use the method
17 that he's using now on the samples.

18 He even said at his deposition, oh,
19 I've done two more tests since my last report. He's
20 doing tests with the methodology right now. We don't
21 need him to put an old light bulb and use iodine that
22 he's not using anymore. We want the current
23 methodology that he's using on these samples. This
24 is the way he's saying, you must use this methodology
25 to test talc for the presence of chrysotile. He's

1 doing it on samples all the time and he's doing it on
2 samples for this MDL. We want an observation of that
3 current methodology.

4 SPECIAL MASTER SCHNEIDER: Okay. We'll
5 move on from this. But I'm not making up this
6 language, this was the language -- hold on -- in
7 Defendant's brief.

8 Quote/unquote, the methodology cannot
9 be replicated.

10 And as I understand your argument, as
11 of the moment, as of the moment, I don't know what's
12 going to happen in the future, the current
13 methodology is not at issue with regard to any of the
14 test results that he's going to testify to. Right?
15 Because didn't you say that Dr. Longo did not test
16 any of the MDL samples?

17 MR. BUSH: Yes, your Honor. I think
18 maybe this is the confusion.

19 So what Dr. Longo did is instead of
20 testing the MDL samples, he tested over the course of
21 state court litigation many, many samples. And what
22 he said is, it's because I've given you all those
23 reports already, instead of giving you all those
24 reports and methodologies again, I'm just
25 incorporating all that testing that I've done into my

1 report. And that includes the most recent testing
2 with the current methodology. With the methodology
3 at issue in the MDL is the most -- it includes the
4 most recent set of testing, including testing he said
5 at his deposition he had just completed. And that's
6 the methodology that we want to observe.

7 Yes, one of the problems is a
8 difficulty in replicating it because it keeps
9 changing, but what Dr. Longo is saying is that he can
10 do the methodology and the key -- I would agree that
11 part of the issue is that he's making these other --
12 these slight changes and tweaks and says it's not
13 ready for publication. But the key lack of
14 replication is the fact that Dr. Longo is saying I
15 need to view it in the microscope and that is
16 the moment -- the fleeting moment that I see what the
17 particle really is. That is the core of why it's
18 incapable to be replicated by other people. There
19 are other things that make it even more difficult,
20 like how it changes over time, but the core lack of
21 replication issue is Dr. Longo testifying that you
22 need to look in the microscope live in order to be
23 able to see the particle.

24 SPECIAL MASTER SCHNEIDER: Okay.

25 The third item listed on page 15 of the

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1 brief is you want to observe MAS's methodology for
2 analyzing the materials, is that right?

3 MR. BUSH: Yeah.

4 When I was describing it before, your
5 Honor, I agree I had combined two and three. So
6 there is the prep method and there is the analytical
7 component we are looking down the microscope.

8 And so two is -- and we want to watch
9 the sample, the analysis, from start to finish. So
10 two would be the start of it and three would be the
11 finish of it.

12 Three is when you're looking down the
13 microscope. And what we want is our expert to be
14 able to look down the microscope at the particles
15 that Dr. Longo or Mr. Hess are claiming are
16 chrysotile so they can see it with their own eyes
17 down Dr. Longo's own microscope. Because he's saying
18 if you have this great lab like mine and you look
19 down the microscope in those moments, you can see it.

20 So three is the looking down the
21 microscope part. And two is the prep method part.

22 SPECIAL MASTER SCHNEIDER: And so if --
23 let's assume it's Mr. Hess doing the microscopic
24 analysis. If he's sitting down at the microscope and
25 looking through it and does whatever he does and says

1 in my belief this is asbestos, you're going to
2 photograph that, videotape that, and then what do you
3 want? Do you want him to get up from his seat, if
4 he's sitting down, and have your expert sit down and
5 look at the same thing?

6 MR. BUSH: That's essentially correct,
7 your Honor.

8 So what Mr. Hess does is he picks
9 representative samples of what he sees and then he
10 takes images of those particles. So Mr. Hess can
11 choose his representative particle just like he
12 normally does. And then, yeah, it would be our turn
13 for our expert to go and look at that particle
14 himself, which Dr. Longo says is a critical component
15 of the analysis.

16 SPECIAL MASTER SCHNEIDER: So during
17 this process, would you anticipate that there would
18 be a back-and-forth discussion between your expert
19 and Mr. Hess?

20 MR. BUSH: No, your Honor. There is
21 not going to be any discussion. They don't have to
22 have a debate or a conversation or an argument about
23 what the particle is. Their expert can go look at it
24 and then when he identifies this representative
25 particle, just like he normally does, then our expert

1 would just look at it and make his own observation.
2 Because for just the reasons I've said, that's the
3 moment Dr. Longo says that's what you have to do,
4 look live at the particle. So we want our expert to
5 do that. They don't need to have a whole discussion
6 about it. They don't need to talk about it at all.

7 SPECIAL MASTER SCHNEIDER: And then
8 what would happen?

9 Would a photo or photomicrograph be
10 taken of the slides for recordkeeping purposes?

11 MR. BUSH: I mean that's the typical
12 process that MAS uses that there would be
13 photomicrographs.

14 Obviously, if there is, you know, what
15 Dr. Longo has said, the photomicrographs aren't
16 enough, but at least that's, you know, the best way
17 we have to record what we're seeing. So we have
18 looking live down the microscope, which is what Dr.
19 Longo says is necessary, and the best photograph we
20 can take of what the expert is seeing.

21 SPECIAL MASTER SCHNEIDER: And would
22 you anticipate that your expert would take that
23 photograph, put it into a report and rely upon it at
24 trial to rebut Dr. Longo's conclusion or Mr. Hess'
25 conclusion?

1 MR. BUSH: I think the photograph would
2 certainly be part of it, but the key rebuttal here
3 wouldn't be the photograph component, it would be the
4 looking-down-the-microscope component.

5 We have photographs. I think to me
6 it's just logical if we're going to do this process
7 that -- and the process normally involves taking the
8 photomicrograph -- to have it so we have that record.
9 But the key rebuttal would be, I looked down this
10 microscope and I looked down at this particle and
11 this is what I saw.

12 SPECIAL MASTER SCHNEIDER: And how long
13 would you take -- how long would you anticipate this
14 process would take between starting, getting the
15 sample ready for analysis until the analysis is
16 completed?

17 MR. BUSH: Yeah, you know, Dr. Longo
18 has given all different times for how long this
19 takes. I want to make clear, we said this in our
20 brief, you know, right now it's been in the
21 centrifuge for 72 hours. No one needs to observe --
22 we don't expect people to stay awake for 72 hours
23 staring at a centrifuge spin. So that's not --
24 that's a passive component that we don't need to look
25 at.

1 What Dr. Longo has testified in the
2 past is that it can take two to six hours to do one
3 of these tests. He says analysts that are good can
4 also do it in a shorter amount of time. So exactly
5 how long it would take is difficult to anticipate,
6 but I imagine that this is not going to be like a
7 24-hour experience. This can largely get done in a
8 day or maybe two -- maybe there is a prep session
9 day, they put it in the microscope, they put it in
10 the centrifuge, I mean, and then there is a day where
11 we look down the microscope and it would probably be
12 a relatively short amount of time. Like, you know,
13 he says the whole process takes two to six hours,
14 then we're looking at, you know, one to three hours
15 for those components.

16 SPECIAL MASTER SCHNEIDER: So there
17 would be one component for the sampling preparation
18 and one component for the actual test?

19 MR. BUSH: I think if you're going to
20 say he needs to put it in a centrifuge for 72 hours
21 and that's the way it sort of practically has to
22 happen, but the key -- the sample prep is sort of if
23 we're going to be there and see it, we want to see it
24 from start to finish. But the key moment and the key
25 thing we need to see is less the preparation time,

1 although I think it's important, it's more the
2 looking live down the microscope. And that's the
3 time that we really need to see it. And that's not
4 over a day, that's a few hours to a half a day at the
5 very longest.

6 So this isn't some giant burden on MAS.
7 And what we put in our reply brief, I mean Dr. Longo
8 has taunted us, oh, just come to our lab. And he
9 said that at a deposition. If he's going to taunt us
10 that way about coming to the lab and looking at the
11 particle at the same time, then we want to take him
12 up on that.

13 SPECIAL MASTER SCHNEIDER: And who is
14 it from the Defendants who's going to come and do
15 this observation and photograph and video?

16 MR. BUSH: I'm not sure. Dr. Sanchez,
17 I imagine, our expert is the one, I imagine, who is
18 going to be looking at it. I'm not sure we've gotten
19 to the exact level of detail of precisely, you know,
20 who would be there. But that's my -- I would say
21 that Dr. Sanchez would be the main person involved,
22 the one who's looking down the microscope. It would
23 be him, our expert.

24 SPECIAL MASTER SCHNEIDER: Is Dr.
25 Sanchez a third expert who's going to critique Dr.

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1 Longo's work?

2 MR. BUSH: Yes, your Honor. He's
3 disclosed in this MDL. And I believe his deposition
4 is coming up in short order.

5 SPECIAL MASTER SCHNEIDER: What is he
6 an expert in?

7 MR. BUSH: He is also a microscopist,
8 so he does -- he's a microscopy expert who has tested
9 a lot -- he's another microscopy expert.

10 SPECIAL MASTER SCHNEIDER: Has he
11 produced a report critiquing Dr. Longo's work?

12 MR. BUSH: He has, your Honor, in this
13 MDL.

14 SPECIAL MASTER SCHNEIDER: Along the
15 lines of Dr. Wiley and Dr. Su?

16 MR. BUSH: I would say, you know, they
17 have different -- it wouldn't be exactly the same,
18 but yes, along the lines of Dr. Wiley and Dr. Su.
19 Yes. That's right. He certainly has his own
20 critique of Dr. Longo in a similar vein.

21 SPECIAL MASTER SCHNEIDER: Does he say
22 anything about the fact that it's critical to the
23 defense of the case to do this inspection or the only
24 way to defend the case is to do this inspection?

25 MR. BUSH: He doesn't say that in the

1 report, your Honor, but that's the legal -- that's
2 what's happening from the legal perspective, from
3 when Dr. Longo shut down questioning during
4 cross-examination by saying you have to look live
5 down the microscope. This is our way to rebut that
6 testimony.

7 SPECIAL MASTER SCHNEIDER: Mr. Bush,
8 we've been at this a while. I think it's time that I
9 give Ms. O'Dell a chance to respond.

10 MR. BUSH: I appreciate that, your
11 Honor. I understand.

12 MS. O'DELL: Thank you, your Honor.

13 There is a lot to respond to actually,
14 but let me just start with the law, which the Court
15 started with.

16 There is just no precedent to allow the
17 invasive nature of this inspection. And I think the
18 Tear case that we cited to your Honor makes clear
19 that Rule 34 does not authorize Defendants' experts
20 to observe Plaintiffs' experts as they do their work
21 to assess -- that case, it was a real estate case,
22 Container Nation.

23 And so what is being proposed is not
24 normal Rule 34 inspect for property. This is coming
25 into MAS labs, it is observing the work of Dr. Longo

1 and Mr. Hess and others, it is having them reproduce
2 or do work that they would not be doing otherwise.
3 Because they have Dr. Longo's opinions in the MDL, he
4 has all that he's going to be opining on right now.
5 And so there is just absolutely no precedent to allow
6 this.

7 And it would be intrusive, it would
8 really paralyze Dr. Longo's lab. He has a large
9 commercial lab and it does a lot of other things,
10 which we've listed in our brief. And it would
11 require a tremendous disruption in order for this to
12 take place.

13 There are samples from other cases, not
14 just talc cases, but other cases that these analysts
15 are working on. There are other materials. It would
16 be incredibly expensive and obtrusive. The nature of
17 the burden really can't be overstated.

18 But, your Honor, you got to sort of
19 factually some of the heart of this.

20 Number one, is there is talc that
21 remains and can be tested by Johnson & Johnson's
22 experts, if they so choose. And in many instances,
23 they have not elected to do so. And so that's their
24 choice. They are not, under the law, allowed to
25 compel Dr. Longo to do testing and then watch them

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1 test when they can do that testing on their own.

2 You heard about the samples, and I just
3 want to correct something. You know, there were
4 Chinese historical samples that are part of Dr.
5 Longo's fourth supplemental report, so MDL samples.
6 Both Imerys and J&J. And so they have opportunity to
7 do this themselves.

8 You heard this discussion from Matt
9 about methodology. What we want is to observe the
10 latest methodology. Again, what I said before is in
11 each individual report he described the methodology
12 he employed. It has been adjusted over time as he's
13 learned more and they have had more experience.

14 But the most recent reports, and I
15 would say one that hasn't been mentioned at all,
16 we've only heard about the Valadez case, but there
17 are numerous other cases, not the least of which is
18 Ms. Newsome's case, which is an MDL plaintiff,
19 bottles that she retained were tested and chrysotile
20 asbestos was located. There is a methodology
21 described in that report including not only what they
22 did from a mechanical standpoint, but the microscope
23 that was used, all the things that were a part of
24 that methodology. Dr. Longo was not asked one
25 question about that report at all. He was asked

1 about his general methodology. And if they want to
2 replicate that, they can do that.

3 As you pointed out, Dr. Su and Dr.
4 Wiley in particular -- Dr. Sanchez comments less on
5 the PLM work than the others, theirs is more
6 detailed, but they are well-recognized experts and
7 they can get a sample of Johnson's Baby Powder and
8 they could replicate Dr. Longo's methodology, if they
9 chose to. But they have not. And so there is no
10 reason to compel this of Dr. Longo.

11 Further, in terms of what would happen
12 at some inspection if this burden were put on Dr.
13 Longo, would get down to a photomicrograph, which
14 they already have in spades in every report. And
15 they are commenting on those now and they have never
16 expressed in their expert reports, Dr. Wiley and Dr.
17 Su, that they need more. And in Dr. Sanchez's case,
18 he has testified in nearly all, if not all, the
19 recent mesothelioma trials, and he has testified
20 fully and never once expressed having inadequate
21 information in order to provide his opinions.

22 And in the case of Zimmerman, and I
23 want to correct something that was in error in the
24 Plaintiffs' brief, it said there hadn't been testing
25 in some of the cases. Well, Zimmerman is a case

1 where there was testing by Dr. Sanchez that had not
2 been disclosed in the MDL, so we weren't aware of
3 that. But he tested the samples himself and he said
4 I didn't find any asbestos. That is really talc.
5 And what Dr. Longo is identifying is misidentified.
6 So they are fully capable of defending this case as
7 they've done in other cases in recent years and
8 certainly without -- without having an inspection.
9 And that's been two-and-a-half years where this has
10 never been requested.

11 And I will say, not only is there no
12 other case where this has been allowed in any
13 reported case, but there is no evidence that it's
14 ever been allowed in this type of litigation,
15 asbestos litigation, for decades. I mean this is the
16 most obstructive, invasive request I think that has
17 been made certainly in the talc litigation and I
18 would suggest others.

19 And let's get down to it, you know,
20 Judge, this is really -- this is, you know, in the
21 last round of testing, the debate was is it
22 asbestiform or not asbestiform, looking at
23 photomicrographs and images of fibers. And so that
24 was from TEM. Now the debate has become the color
25 and it is whether it's yellow or magenta,

1 essentially. And that is going to be a matter of
2 debate and the defense has everything they need to
3 cross-examine Dr. Longo and also put forward their
4 own experts' opinions. And having them look down the
5 microscope and over the shoulder of Mr. Hess or Dr.
6 Longo for hours, because it's two to six hours per
7 sample and it's over the microscope, so what does
8 that mean? Mr. Hess is going to look for his two to
9 six hours and whomever the defense proposes for two
10 to six hours? And that is an untenable -- it's an
11 absolutely untenable approach to this.

12 And so, your Honor, let me just speak
13 to a couple more things that were put forward in the
14 defense's reply.

15 Number one, there were some comments
16 about Steve Compton and Dr. Compton giving testimony
17 in other cases. And he was referred to as a
18 Plaintiffs' expert. He is not an expert in this MDL.
19 I'm sure he's been an expert in other mesothelioma
20 cases. I don't know him. I don't know his
21 methodology. We don't know his methodology. We have
22 no information about that. He's not a part of this
23 case. And so, you know, it really is irrelevant to
24 the proceedings.

25 Number two, I would say, your Honor,

1 this is -- I believe you hit the nail on the head,
2 but I want to make it clear for the record. This is
3 not destructive testing. That new argument raised in
4 the reply was inappropriate. This is not destructive
5 testing and any suggestion that it was, I think, as
6 the Court notes, is incorrect.

7 And further, your Honor, when you think
8 about all of this, this is really early Daubert.
9 This is really an early Daubert motion to debate the
10 methodology of Dr. Longo. And there will be plenty
11 of time for that at the appropriate time after the
12 briefing is done. And so I think it's misplaced in
13 that sense.

14 And the other thing, your Honor, and
15 I'm thinking about, you know, what's been said and
16 the methodology that Dr. Longo uses. And
17 particularly, I just want to go back. There has been
18 an emphasis on Valadez and that's just one of the
19 reports, one of the many reports. And that was in --
20 I believe it was February 2023 that that was -- that
21 that report was issued.

22 Let me check myself to make sure that's
23 right. That's right.

24 And one of the things we put in our
25 papers was information about Dr. Longo's very

1 detailed response to the Defendant's criticisms of
2 his methodology in Valadez. And we put it in our
3 submission as -- let me turn to it, if I can, your
4 Honor. Give me just a moment.

5 Exhibit H of our opposition in which he
6 responds to some of the criticisms that are still
7 being made in great detail. And he continues to
8 outline his methodology and to outline exactly what
9 he's doing, including documentation with
10 photomicrographs. And that's what's required under
11 the rules in terms of describing your methodology.

12 It can be replicated if the Defendants
13 chose. And they have not done that. And so,
14 therefore, for all these reasons and for the fact
15 that there is absolutely no legal precedent for this,
16 we urge the Court to deny the motion.

17 SPECIAL MASTER SCHNEIDER: Leigh,
18 before I turn it over to Matt for the last word, I
19 just want to make sure that you have every
20 opportunity to make whatever argument you want
21 because this is going to be your last word. So is
22 there anything else you want to add? Because I'm
23 going to turn it over in a moment to Matt for his
24 last word.

25 MS. O'DELL: Your Honor, thank you for

1 that.

2 If you give me a moment just to look at
3 my notes and if there is something else that I have
4 overlooked, give me an opportunity to do that, I
5 would appreciate it.

6 Your Honor, the only thing I could have
7 expounded on a little bit more, if I could, sort of a
8 parenthetical here. I said it wasn't destructive
9 testing, it's not. There is more material to test.
10 But there have been some suggestions that somehow the
11 slides have been destroyed and somehow that's
12 untoward, that Dr. Longo's methodology in not
13 retaining those slides was improper. And I do think
14 I want to go back to that quickly and just make clear
15 that this is part of the PLM method that those slides
16 use a particular oil in their creation. And it's
17 called an IR fluid. And there is a lot of that
18 description in the reports.

19 And over the course of time after that
20 slide is examined, within two weeks or so, that fluid
21 begins to evaporate and crystalize and, therefore,
22 the slide is not appropriate for examination anymore.
23 That's true for any PLM analyst, not just Dr. Longo.
24 And so any suggestion that there has been somehow
25 improper action there I think is -- would not be

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1 true. Their experts will be asked about that as
2 well, but I understand that to be generally accepted,
3 you know, in PLM testing.

4 And I think I would just conclude again
5 by saying there is absolutely no legal precedent for
6 this and, you know, we strongly object to this type
7 of inspection.

8 SPECIAL MASTER SCHNEIDER: Thank you,
9 Leigh.

10 Matt, I'm going to turn the floor over
11 to you for the last word for whatever you want to
12 say.

13 MR. BUSH: Thank you, your Honor.

14 I just sort of want to sum up and put a
15 fine point on what we're talking about.

16 So the image on the left is sort of the
17 larger sample. All those yellow particles are talc
18 particles. And what Dr. Longo and Mr. Hess are doing
19 is they're picking out that one and saying that
20 yellow particle is actually chrysotile, even though
21 all the other yellow ones are talc.

22 Talc is supposed to look yellow under
23 these kinds of analysis and chrysotile is supposed to
24 look purple. And what Dr. Longo and Hess are saying
25 is that the particle that I blew up is the color

1 purple on the bottom there that's associated with 560
2 nanometers.

3 So what Dr. Sanchez is saying is, I see
4 that as yellow. When I do my own testing, what I see
5 is yellow. That's talc. But what Dr. Longo is
6 saying is no, no, no, when you look live down my
7 microscope, I can tell -- that means is when there is
8 purple there. And it's the moment that you're
9 looking live down the microscope that you can tell
10 that that's purple.

11 And this isn't cherry picking or just
12 some quote. This isn't some ancillary issue. He
13 didn't say it just once. He has repeatedly defended
14 his testing by saying the way you can differentiate
15 talc from asbestos is to look live down the
16 microscope. And that's the only way to independently
17 verify his results.

18 I know we talked about this a little in
19 the last motion, but in the Valadez deposition he was
20 asked, for example, is a particle talc or asbestos.
21 And he said he couldn't answer without looking down
22 the microscope. And in the example I've given a
23 bunch of times already he said, well, doesn't all
24 what you're doing make your entire analysis wrong?
25 And he's saying you need to look down the microscope.

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1 So Dr. Longo is saying if you look down
2 the microscope that's live, that's the way you can
3 make these determinations and that's the way you can
4 independently verify my results.

5 And the reason you, Dr. Sanchez, and
6 all these other people aren't seeing it is because
7 they're not looking live down the microscope. He's
8 saying that that is the fleeting moment, like I said,
9 that you can differentiate talc from asbestos. It's
10 the way he's defining his methodology and there is no
11 other way to do that, to take him up on that -- on
12 that -- on that testimony, that the only way that you
13 can really see this if you were looking live down the
14 microscope, is to go and look down the microscope at
15 the same time as him, as I said, as he basically
16 taunted us to do in a deposition before.

17 And so this is -- this is really
18 critical to the defense because it's critical to the
19 way Dr. Longo is justifying all of his results. His
20 entire analysis that he testifies in the Clark case
21 is by saying look live down the microscope. And that
22 makes this case very, very unique and it makes it
23 different from a lot of the other cases where you
24 have an ability to do split testing in a different
25 way.

1 It's momentarily live down the
2 microscope is how he's justifying his entire report.

3 And so the last thing I'll say is there
4 is no evidence of a burden on MAS. I mean as we said
5 in the briefs, I certainly recognize an inspection
6 inherently has some burdens that are not associated
7 with, say, a document request, but there is no
8 evidence that this would be some undue burden or
9 would shut down the lab. This is something that's
10 totally capable of doing and it is critical to the
11 way that Dr. Longo is defining how he's identifying
12 chrysotile in these talc samples, which is something
13 that goes to the heart of the cases in this MDL.

14 So that's my last word on this motion.

15 SPECIAL MASTER SCHNEIDER: Thank you,
16 Counsel.

17 The record is closed on the Inspection
18 Motion.

19 Like I said, I'm going to take the
20 motion under advisement, but you will get a prompt
21 decision.

22 I think someone said at the start this
23 morning that there might be some either associates or
24 summer clerks or interns observing what went on
25 today. As far as I'm concerned, it was a great

1 learning experience for those people. They saw some
2 terrific lawyers argue some very, very difficult
3 issues. The briefs were superb, as usual and as
4 expected. And it's just a pleasure for me to deal
5 with professionals, no matter how the ultimate
6 resolution turns out.

7 Theresa, thank you very much. I'm sure
8 you will continue your career record of not making
9 one mistake in a transcript, so that's always
10 appreciated.

11 Thank you, everybody. We're adjourned.
12 (Hearing Adjourned)

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C E R T I F I C A T E

I, Theresa Mastroianni Kugler, a Notary Public and Certified Court Reporter of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the testimony as taken stenographically by and before me at the time, place, and on the date hereinbefore set forth.

I DO FURTHER CERTIFY that I am neither a relative nor employee nor attorney nor counsel of any of the parties to this action, and that I am neither a relative nor employee of such attorney or counsel, and that I am not financially interested in the action.



Theresa Mastroianni Kugler,
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Commission Expires July 11, 2026
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Date: June 17, 2024



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